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In The

Supreme Court of the United States

October Term, 1990

JAMES C. PLEDGER, COMMISSIONER
OF REVENUES OF ARKANSAS,

Petitioner,

v.

DANIEL L. MEDLOCK, ET AL.,

Respondents.

No. 90-29

[Caption In No. 90-38 On Inside Cover]

On Certiorari To The Arkansas Supreme Court

BRIEF AMICI CURIAE OF THE COMPETITIVE CABLE ASSOCIATION AND THE MEDIA INSTITUTE IN SUPPORT OF RESPONDENTS IN NO. 90-29 AND PETITIONERS IN NO. 90-38

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CITY OF FAYETTEVILLE, ARKANSAS,

Intervenor.

No. 90-38

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INTEREST OF AMICI

The Competitive Cable Association is a non-profit association whose members are committed to establishing and supporting First Amendment rights for the operators of cable television and other video distribution systems. The Association is opposed to unreasonable limits upon or barriers to the entry of multichannel video providers, and stands for the right to compete in the supply of such video services. In connection with its professed goals, the Association holds seminars, participates in proceedings before the Federal Communications Commission and other federal agencies, publishes materials, testifies before congressional and other legislative bodies, and participates in select court cases.

The Media Institute is an independent, non-profit, tax exempt research organization supported by a wide range of foundations, corporations, associations, and individuals. In 1987, the Institute created the First Amendment Center For The New Media to study speech rights connected with the development of new information services. Through its First Amendment Center, the Institute participates in select cases, conducts research projects, and sponsors publications relating to the generation, distribution, and receipt of electronically transmitted information. The right to engage in these three activities is integrally related to the Institute's research activities.

Both *Amici* believe that the emerging electronic members of the media, such as cable television, are entitled to full First Amendment protection from governmental

restraint, and that the continuing vitality of our democratic process depends, in part, upon our ability to continue the balance struck between government and the mass media as electronic communication overtakes print as the dominant form of mass media in our society. *Amici* support the position that the First Amendment to the United States Constitution precludes the imposition of taxes upon cable television services where the imposition discriminates between forms of the media without compelling justification.

Amici also believe that this case is not an appropriate vehicle for consideration by the Court of the broader issues relating to appropriate governmental regulatory responses (if any) to specific perceived differences in the method of delivery of speech between various members of the mass media. *Amici* wish to urge the Court that care be taken not to appear to address issues of regulation, as opposed to taxation, of cable television the resolution of which should await a more fully developed and better focused factual record.

SUMMARY OF ARGUMENT

1. This Court's decisions which interpret the First Amendment to preclude differential taxation of the press, absent a showing that the government interest outweighs the burden and cannot be achieved by means that do not infringe First Amendment rights as significantly, should be equally applied to taxation which discriminates between different forms of the mass media. The conclusion of the court below that different forms of media can

be taxed differently so long as they do not deliver "substantially the same service" should be rejected as lacking a logical connection to the governmental purpose to be achieved – the raising of revenue.

A blending of the technological differences between various forms of mass media is occurring and will continue to occur, and the emerging forms of electronic media, such as cable television, should not be relegated to a lesser status under the First Amendment. Cable television has a unique potential to participate in the democratic process through journalistic coverage of and comment upon local governmental activities. This potential makes cable television an important member of the media, as well as rendering it vulnerable to taxation for retaliatory or censorial reasons.

2. Because of the lack of a fully developed factual record as well as a lack of adversity, the Court should not resolve issues relating to the appropriate regulatory responses of local government to particular perceived attributes of cable television or other multi-channel video providers, outside of the taxation area. There are serious and substantial questions about several "facts" contained in the Arkansas Supreme Court decision, which should not be adopted by this Court without careful legal and factual examination. The Court should await a later case to address these issues, and should explain in its decision that it does not reach them in this case.

ARGUMENT

I. DISCRIMINATORY TAXATION AMONG THE MEDIA SHOULD NOT BE PERMITTED ABSENT COMPELLING JUSTIFICATION; EMERGING ELECTRONIC FORMS OF THE MEDIA SHOULD NOT BE RELEGATED TO SECOND CLASS STATUS

Past decisions of the Court make clear that the government may not differentially tax members of the press absent a compelling justification for the differing treatment. *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 421 (1987) (hereinafter *"Ragland"*); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) (hereinafter *"Minneapolis Star"*). The government's general interest in raising revenue, while compelling, will not suffice to save a differential tax scheme in this context. Rather, such a taxing scheme is consistent with First Amendment principles only if "the government interest outweighs the burden and cannot be achieved by means that do not infringe First Amendment rights as significantly." *Minneapolis Star, supra*, 460 U.S. at 586 n.7.

Two related constitutional questions appear to be raised by this case: (1) "When taxing the electronic media, can the First Amendment guarantees set forth in *Minneapolis Star* and *Ragland* be avoided merely by the assertion of differences between members of the media, where those differences are unrelated to the governmental purpose of the taxation?" (2) "Is differential taxation of different forms of the mass media subject only to the minimal judicial scrutiny which is applied where fundamental interests are not implicated?" *See, Kahn v. Shevin*, 416 U.S. 351, 355 (1974); *Allied Stores v. Bowers*, 358 U.S.

522 (1959). *Amici* believe the answer to both questions should be in the negative. *Amici* believe that the purposes of the First Amendment require that government be held to the same standards for differential taxation between the media as among the same medium.

The court below, in effect, "split the baby." It rejected the trial court's contention that cable television's presumed "use of public rights-of-way" justified different tax treatment for cable television than for other media,[1] since the governmental interest asserted (raising revenue) was unrelated to the perceived difference.[2] However, the court also decided that the type of dissemination provided through print and by cable television could be characterized differently, and concluded that differential taxation is permissible under the First Amendment, as long as the differentially taxed media do not deliver "substantially the same service". The court below ruled that cable television and satellite television provide "the same service", but impliedly found that cable television and the print media do not.[3] The decision does not indicate whether the court believed that any difference it perceived in the services offered by print and cable television was related to the governmental interest in raising revenue, or whether the court merely deferred to a legislative judgment on that question.

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[1] *See,* Petition for Certiorari in No. 90-29 at C-10.

[2] *Id.* at A-3.

[3] *Id.* at A-5 – A-6.

Amici believe that the court below erred in failing to focus upon the question of linkage between the "difference" it found between the services offered by print and cable television and the interest in raising revenue sought to be served by the taxes imposed. *Amici* also believe that the court erred if it deferred to legislative judgments in this context. Finally, the court appeared to uphold discriminatory taxation based upon criteria intertwined with content, contrary to this Court's holding in *Ragland, supra*. If this Court affirms the analysis of the Court below, the First Amendment concerns raised in *Minneapolis Star, Ragland* and *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), will provide only limited protection against taxes upon the emerging electronic media, and as a practical matter, will likely relegate those forms of media to a "second class" status, subject to far more taxation than is the print medium.

The ultimate question is whether traditional First Amendment freedoms are to be recognized when most communication, including that of the traditional press, is already – or will soon be – produced, transmitted and received electronically. In the words of one commentator:

> The issue of the handling of the electronic media is the salient free speech problem for this decade. . . . [¶] . . . The onus is on us to determine whether free societies in the twenty-first century will conduct electronic communication under the conditions of freedom established for the domain of print through centuries of struggle, or whether that great achievement will become lost in a confusion about new technologies.

Pool, *Technologies of Freedom* 10 (1983). Mark S. Fowler, former Chairman of the Federal Communications Commission, has noted that the "functional differences [between newspapers and cable television] are merging into one and the same technology" and that "[i]t cannot be acceptable . . . that the protections created by the First Amendment should dwindle and the balance struck between government and the free press should be undone, whether by direct or indirect means." Cable Television Regulation, Part 2: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp., 97th Cong., 2d Sess. 203-04 (1982).

While this Court has often noted that specific differences in method of communication may justify different governmental responses (*Southwestern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 [1975]), the Court has required a particularized factual showing that the differential treatment was properly tailored to a specific and peculiar problem presented by the conduct connected to the form of communication at issue:

> Only if we were to conclude that live drama is unprotected by the First Amendment – or subject to a totally different standard from that applied to other forms of expression – could we possibly find no prior restraint here. Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952); see, Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969). By its nature, theater usually is the acting out – or singing out – of the written word, and frequently mixes

> speech with live action or conduct. But that is no reason to hold theater subject to a drastically different standard. For, as was said in Burstyn, supra, at 503, when the Court was faced with the question of what First Amendment standard applies to films:
>
> "[T]he basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule."

Id. Amici submit that the "basic principles of freedom of speech and the press" do not "vary" between emerging electronic media, such as cable television, and the more traditional print media. Having made the decision to exempt the print media from the taxation at issue, a compelling showing should be required of the State of Arkansas to justify different treatment of cable television.

Cable television is the medium of mass communication most suitable for coverage of local governmental activities, and journalistic comment upon such activities. Unlike the broadcast medium, cable television can be effectively "narrow-casted" to residents within the boundaries of a particular local governmental unit, thus permitting political coverage and commentary to be directed only to those most likely to have an interest in receiving it. Unlike the print medium, cable television permits video coverage (either live or tape-delayed) of local governmental activities, televised interviews, and "call-in shows" or similar opportunities for public participation.

This potential for cable television to play a role in the democratic process[4] – particularly at the local level – engenders precisely the same free speech concerns which require invalidation of special taxes upon newspapers, and makes the need for First Amendment protection from the threat or reality of retaliatory governmental taxation as important for cable television as for the printed press. *See, Grosjean, supra,* at 245-50.

II. THE COURT SHOULD NOT ASSUME THE ACCURACY OF THE ARKANSAS COURTS' DISCUSSION OF CABLE TELEVISION'S "USE" OF PUBLIC PROPERTY OR THE "NEED FOR A FRANCHISE"

Amici's unique perspective in this case is its particular interest in promoting the ability of multi-channel video providers, including cable television, to compete with each other. The taxation issue before the Court is an important one in this regard, since the imposition of taxes such as the one at issue here can have a deleterious effect upon the economic viability of fledgling competition in this area.[5] The taxation issue appears fully presented and

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[4] *See, New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964); *Mills v. Alabama,* 384 U.S. 214, 219 (1966).

[5] Though Legislative motive is not a necessary inquiry in the taxation context (*Minneapolis Star, supra,* 460 U.S. at 592-93), the Court should be aware of the potential for differential taxation among the media to be utilized as a means of preventing viable competition between cable television companies or other multi-channel video providers. The Federal Communications Commission earlier this year noted the prevalent tendency of local governments to utilize both direct and indirect

(Continued on following page)

ripe for decision. However, *Amici* are concerned that the Court might accept as true certain factual or legal premises espoused by the court below which, if reflected in a decision by this Court, could have an unintended effect upon consideration by the lower courts of the First Amendment issues raised by governmental regulation of

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(Continued from previous page)

means to impede such competition. *See*, Federal Communications Commission, Report No. 90-276 ("In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision Of Cable Television Service"), July 31, 1990 at ¶¶131-142.

> 138 . . . While exclusive franchising is not the only impediment to the growth of second competitive systems, it is clear that the number of competitive systems would grow at a more rapid pace if local franchise authorities were unable to discourage or forbid such systems. . . .
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> * * *
>
> 141. We recommend that Congress amend the Cable Act to forbid local franchise authorities from unreasonably denying a franchise to applicants that are ready and able to provide service. Congress should also make it clear that local authorities may not pass rules whose intent or effect is to create unreasonable barriers to the entry of potential competing multi-channel video providers. Franchise requirements should be limited to appropriate governmental interests, such as establishing requirements concerning public health and safety, repair and good condition of public rights-of-way, and the posting of an appropriate construction bond.

Id., ¶¶138, 141 (fn. omitted). *See also, Pacific West Cable Co. v. City of Sacramento*, 672 F. Supp. 1322, 1328 (E.D. Cal. 1987).

cable television (outside of the taxation context), particularly regulation at the local level through the issuance of "franchises". *See, City of Los Angeles v. Preferred Communications*, 476 U.S. 488, 490 n.1 (1986).

The Court below asserted that "cable television uses public property and must obtain a franchise to do so," and that "a cable television enterprise pays a franchise fee for the use of the rights-of-way."[6] The "facts" embraced in the quoted portion of the Arkansas court's decision are, in *Amici's* view, incorrect as a general matter, and should not be accepted without careful examination.[7] *Amici* urge the Court to await a case with a more fully developed factual record on these issues before addressing them.[8]

Cable television companies generally string their wires upon existing public utility facilities, located in public utility easements which have long been dedicated to the provision of public utility services. The provision of "pole attachment services" by public utilities to cable television companies is defined by federal and some state laws as constituting a "public utility service." 47 U.S.C.

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[6] Petition for Certiorari in No. 90-29 at A-3.

[7] *Amici* have no intimate knowledge of the particular circumstances surrounding cable television in Pulaski County, Arkansas. However, because the Arkansas court spoke generally, *Amici* are concerned with the possibility that such generalities might be adopted by this Court without comment.

[8] In *City of Los Angeles v. Preferred Communications, supra*, the Court specifically noted its desire to obtain a fully developed record about "the present uses of the public utility poles and rights-of-way and how Respondent proposes to install and maintain its facilities on them." 476 U.S. at 495.

§224. *See, e.g.*, Cal. Pub. Util. Code §767.5. Since many public utility easements are acquired directly from private land owners, there is doubt as to the extent of the property interest held by local governments in these rights-of-way, at least in some circumstances. *See, Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1559, 1563-68 (N.D. Cal. 1988); *County of Sacramento v. Pacific Gas & Electric Co.*, 193 Cal.App.3d 300, 238 Cal.Rptr. 305 (1987).

Moreover, to the extent that the word "franchise" is understood to refer to a "special privilege conferred by government on individual or corporation, and which does not belong to citizens of country generally of common right" (Black's Law Dictionary [5th ed.] at 592 [1979]),[9] *Amici* believe that the same is inconsistent with the exercise of free speech activities. *Amici* do not believe that the First Amendment permits governmental selection of particular persons to engage in the "privilege" of conducting free speech activities, as opposed to the setting forth of uniform requirements designed to meet legitimate health and safety needs. *See, Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1409 (9th Cir. 1985), *aff'd.*, 476 U.S. 488 (1986).

Finally, if and to the extent that cable television does utilize public property, substantial questions are raised as to the extent of authority for imposition of a "franchise fee" or other payment in exchange for that use. *Compare, Century Federal, supra, with Group W. Cable, Inc. v. City of*

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[9] *See also, California v. Central Pacific Railway Co.*, 127 U.S. 1, 40 (1888); *Copt-Air v. City of San Diego*, 15 Cal.App.3d 984, 987, 988-89 (1971).

Santa Cruz, 679 F. Supp. 977 (N.D. Cal. 1988) and *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580 (W.D.Pa. 1987), *aff'd. on other grounds*, 853 F.2d 1084 (3rd Cir. 1988).

These are difficult issues which merit consideration upon a more fully developed factual record than is presented to the Court in the instant case. This is particularly true where, as here, the parties before the Court had no incentive below to represent the interests of affected third parties – those persons interested in competing in local cable television markets on a competitive basis. The "franchise system" of regulating cable television has been commonly utilized to preclude entry of competition.[10] The incumbent cable television operators, having already obtained such franchises, understandably are not eager to challenge the circumstances which make competition with them unlikely. Obviously, the local governmental bodies which now control the "franchising process" have no incentive to challenge it. Thus, while the parties before the Court are appropriately adverse to litigate the taxation issue, the Court should await another case before adjudicating (explicitly or implicitly) the underlying questions regarding the manner and extent to which cable television typically utilizes public property and the appropriate regulatory responses to that use.

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[10] *See*, n. 5, *supra*.

CONCLUSION

For the reasons stated above, that portion of the decision of the Arkansas Supreme Court raised by the petition in Docket No. 90-38 should be reversed, and that portion raised by the petition in Docket No. 90-29 should be affirmed. However, this Court's decision should not reach – and should explain that it does not reach – the underlying questions as to appropriate regulatory responses of local government to the particular attributes of cable television or other multi-channel video providers, outside of the taxation area.

Respectfully submitted,

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Dated: November 15, 1990